

FILED 21

JUL 20 1994

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMAWILLIAM B. GUTHRIE
Clerk, U. S. District Court

-y- Deputy Clerk

BILLIE A. WILLIS,
PLAINTIFF,
VS.
DONNA E. SHALALA, Secretary
of Health and Human Services
DEFENDANT.

CASE NO. CIV-94-063-B

FINDINGS AND RECOMMENDATIONSSCOPE OF COURT REVIEW - Court review is limited to consider-

ation of the pleadings and transcript filed by the Secretary as required by 42 USC 405(g). The Court is obligated to determine whether there is substantial evidence in the record to support the Secretary's decision. Weakley v. Heckler, 795 F.2d 64 (10th Cir. 1986); Cage v. Califano, 638 F.2d 219 (10th Cir. 1981); Tillery v. Schweiker, 712 F.2d 601 (10th Cir. 1983). Substantial evidence is more than a scintilla, but less than a preponderance; it is such evidence that a reasonable mind might accept to support the conclusion. Richardson v. Perales, 402 U.S. 389, 401 (1971). The Court, in this review, has the power to affirm, modify or reverse the Secretary's decision with or without remand for a rehearing.

NATURE OF APPEAL - Court review of denial of claim for disability under Article 2 and supplemental security income (See Sections 216(i); 223; 1614(a)(3)(A) of Act).

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CHRONOLOGY OF CASE

1. 8-3-92 Plaintiff's initial Application for Disability and SSI (Tr. 90-99)
2. 10-2-92 Administrative Denial of Plaintiff's Claim (Tr. 100-105)
3. 10-22-92 Denial of Application for Reconsideration (79-81)
4. 6-17-93 Hearing Before Administrative Law Judge (Tr. 44-89)
5. 7-28-93 Unfavorable Decision by Administrative Law Judge (Tr. 11-21)
6. 12-2-93 Order of Appeals Council Denying Review (Tr. 3-5)
7. 1-28-94 Complaint filed with this Court

DISCUSSION AND ANALYSIS - Plaintiff, Billie A. Willis, (SSN 467-70-3197) DOB: 2-3-46 filed his claim for disability and SSI on 8-3-92 alleging he had not been able to work since 12-31-91. Plaintiff in his application stated that he had completed the 7th grade and had passed the GED examination (Tr. 94-99). In his Disability Report (Tr. 119-126) the disabling condition included bothersome shoulders, elbows, right knee, back trouble, trouble with right arm and being blind in one eye and recently had trouble hearing. Plaintiff further indicated he had a problem with his walking and could not sit or lay down for very long at a time and was in constant pain and it was growing worse.

The administrative hearing was held in Hugo, Oklahoma on

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6-17-93 before The Honorable Bruce L. Evans, Administrative Law Judge. Plaintiff's testimony (Tr. 49-77) can be summarized by stating that from the time of his injury in 1988 and at the current time he could probably sit two to three hours per day, could stand a total of three hours a day, could not lift more than 10 pounds without hurting and has problems walking. As to his daily activities, Plaintiff testified that his ordinary activities include getting up around 6:30 a.m., drinks coffee and watches TV and then usually lays down for an hour to an hour and a half and usually goes to bed around 7:00 p.m. and is up and down all night. Plaintiff testified he can't do any housework, cannot bend, cannot climb and ladder and sometimes goes grocery shopping with his wife or to Wal-Marts with her. Plaintiff testified he didn't have any income and was making ends meet by selling equipment he had used in his previous business of small engine repair and that he is in constant pain which is present in his lower back, left shoulder, left hip and right knee.

The medical narrative reports in this matter by Dr. Mike McGinnis (Tr. 151-153) which stated Plaintiff to be completely disabled, did note that Plaintiff's left shoulder reveals decreased range of motion and pain on palpation over the A/C joint. Dr. Dandridge's report (Tr. 158-159) indicated that there was some restriction in the left

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shoulder and pain and tenderness at the biceps tendon. He further indicated in his Residual Function Assessment (RFC) that Plaintiff's ability to reach was impaired (Tr. 161). The RFC assessment by the disability determination doctor, Thurman Fiegel, indicated limitation in Plaintiff's reaching and stated he can't reach over head (Tr. 140).

The testimony of the Vocational Expert (VE) (Tr. 77-89), Lonnie Current, was given the hypothetical by the ALJ as a claimant who, considering all of the evidence, including the medical evidence as well as his testimony, that he would be able to perform sedentary work as defined by the Regulations- "Are there sedentary jobs he would be able to perform based on his age, education and past work experience?" The VE then testified that there was in excess of 100,000 in the national economy for this type of work as well as light work (Tr. 80-81).

The ALJ applied the principals as to pain as set forth in Luna v. Bowen, 834 F.2d 161, 165 (10th Cir. 1987) and taking into account Plaintiff's subjective complaints, prior work record, daily activities, type, dosage, effectiveness and adverse side effects of any pain or other medication as well as Plaintiff's treatment for relief of pain determined Plaintiff's pain allegations as not being disabling. In applying the five step sequential evaluation process as set

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forth in 20 C.F.R. Sec. 404.1520, 416.920, the ALJ found Plaintiff had not been engaged in any substantial activity since the alleged onset date of his disability, the Plaintiff did have severe impairments but a combination of impairments did not result in being medically equal to one listed in Appendix I, Subpart B, Regulation No. 4. At Step Four the Plaintiff was determined to be unable to perform his past relevant work as a mechanic, wood cutter and owner/operator of a small engine repair shop (Tr. 20), but that he did have the RFC to lift 10 pounds maximum and to frequently lift and carry small objects and his vision loss was not a factor inasmuch as he had worked with it for a number of years.

The Court, taking into account the entire record as a whole, finds that there is substantial evidence in the ALJ reaching his conclusion that Plaintiff's pain is not disabling and that the guidelines as set forth in *Luna v. Bowen* were adequately applied in this case. As to Plaintiff's being blind in his right eye, the fact that Plaintiff had continued to work with this impairment for a number of years and that indicates that this is not disabling per se *Dixon v. Sullivan*, 905 F.2d 237 (8th Cir. 1990); *Johnson v. Finch*, 437 F.2d 1321 (10th Cir. 1971) (Discussing longstanding impairments).

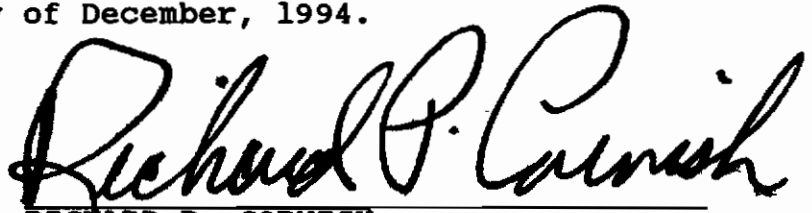
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The Plaintiff in this case has been diagnosed by all medical authorities as having a serious problem with his left shoulder which affected his ability to reach. The ALJ in the RFC assessment, failed to inject this impairment in his hypothetical to the Vocational Expert (VE). The failure of the ALJ to include an uncontroverted impairment in identifying the hypothetical Plaintiff, effects the evaluation by the VE and in this case the Court feels would have greatly diminished if not wholly eliminated all jobs available in the national economy for this Plaintiff.

CONCLUSION - Therefore, the Magistrate Judge finds this case should be remanded to the ALJ who is to consider, in his RFC assessment, the uncontroverted impairment dealing with Plaintiff's left shoulder, biceps and tendons which affect his ability to reach. Parties are herewith given 10 days from the date of this service to file with the Clerk of the Court any objections, with support brief. Failure to object to the Findings and Recommendation within ten (10) days will preclude appellate review of the judgment of the district court based on such findings. 28 U.S.C. Sec. 636(b)(1), Federal Rules of Civil Procedure 72, 6(a) and 6(3), and Local Rule 32(d).

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DATED this 20th day of December, 1994.

A handwritten signature in black ink, reading "Richard P. Cornish". The signature is written in a cursive style with a large, prominent "R" and "C".

RICHARD P. CORNISH
UNITED STATES MAGISTRATE JUDGE